

In The

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CENTRAL CALIFORNIA CANNERIES CO., GRIFFIN &
SKELLEY COMPANY, J. C. AINSLEY PACKING
COMPANY, ANDERSON-BARNGROVER MANFG.
CO., J. F. PYLE & SON, INC., HUNT BROTHERS
COMPANY, SUNLIT FRUIT COMPANY,

Appellants,

v.

DUNKLEY COMPANY (now known as Michigan Canning
& Machinery Company) and DUNKLEY COMPANY,

Appellees.

**REPLY BRIEF FOR PLAINTIFF-APPELLEES TO DE-
FENDANTS - APPELLANTS' POINTS AND AU-
THORITIES ON PETITION FOR LEAVE TO FILE
AN ORIGINAL BILL IN THE NATURE OF A BILL
OF REVIEW.**

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*In the United States Circuit Court of Appeals
for the Ninth Circuit.*

No. 3824.

CENTRAL CALIFORNIA CANNERIES CO.,	
GRIFFIN & SKELLEY COMPANY,	Appellant,
J. C. AINSLEY PACKING COMPANY,	Appellant,
ANDERSON-BARNGROVER MANFG. CO.,	Appellant,
GOLDEN GATE PACKING COMPANY,	Appellant,
J. F. PYLE & SON, INC.,	Appellant,
HUNT BROTHERS COMPANY,	Appellant,
SUNLIT FRUIT COMPANY,	Appellant,

v.

DUNKLEY COMPANY (now known as Michigan Can-
ning & Machinery Company) and DUNKLEY COM-
PANY,

Appellees.

**REPLY BRIEF FOR PLAINTIFF TO DEFENDANTS-
APPELLANTS' POINTS AND AUTHORITIES ON
PETITION FOR LEAVE TO FILE AN ORIGINAL
BILL IN THE NATURE OF A BILL OF REVIEW.**

As probably being most expeditious it is our purpose
to consider defendants-petitioners' brief in the order in

which the matters are presented. We do this, notwithstanding that it apparently presents technical grounds first.

Defendants-petitioners' showing is wholly without merit, as has been pointed out very authoritatively by Judge Van Fleet in his opinion in Record No. 3824, pages 279-301 inclusive. Defendants have produced no document, no article, nor anything other than the oral testimony, without any support, based on the memory of the witnesses as to matters fifteen years past.

Judge Van Fleet points out that such testimony does not comply with the Supreme Court rule as to matters of evidence which should be regarded as anticipating an existing patent, referring to *Symington v. National Malleable*, 250 U. S. 383, at 386, the latest word of that court on the subject, affirming very old and recognized law.

With this preliminary statement, we will consider the defendants-petitioners' brief on the motion page by page and title by title.

The "Statement" at page 4 is strikingly erroneous. It says first that "The invalidity of the Dunkley patent has already been decreed by this court." Counsel should know better than to make such an assertion.

In this very case this court has upheld the Dunkley patent and sent down its peremptory mandate after considering defendants' petition to set aside the decrees. See *Central California Canneries v. Dunkley*, 247 Fed.

790, and the mandate and the order of court herein denying defendants' motion and indicating that its mandate should be without prejudice to the plaintiff to add a new party.

In the Pasadena case, this court in its opinion (*Dunkley v. Pasadena*, 261 Fed. 386), beginning bottom line of page 386, states:

“The court below found against the appellants on each of these several propositions, but in the view we take of the case it is only necessary for us to consider the question of infringement; for, assuming that the decision in that case” (meaning the decision in the case at bar, reported in 247 Fed. 790) “should be followed here and is binding upon the appellees, the question of infringement was not there involved, because the Grier machine or device then before the court is not involved in the present case.”

The court then quoted with approval from its decision in the instant case. The patent was thus distinctly upheld.

On the petition and motion to modify the mandate in the Pasadena case, this court denied the motion and remarked that the judge rendering the opinion might care to change the particular matter quoted above but that judge made no change in it, and allowed it to stand as reported, and it stands as the final word of this court. Therefore the decision in no way affects the validity and scope of the Dunkley patent, as it was not passed upon further than to hold that a device which does not contain a spray does not infringe.

The “*Statement*” of petitioners’ brief says, secondly, that “In any event plaintiff herein has in subsequent litigations so changed its testimony, etc., that the showing made in behalf of the patentee is under the law and the decisions legally insufficient to sustain the validity of the patent.”

We wish most emphatically to deny this aspersion. The plaintiff has in no way changed its testimony in any particular. It has no desire to change its testimony in any particular. It does not need to change its testimony in any particular. And the testimony has supported the Dunkley patent from the very beginning, as is evidenced by the language of the Court of Appeals for the District of Columbia in granting the patent, after a most vicious and unwarranted contest and attack, that court saying:

“Dunkley is the first to invent and put into practice a rapid and effective machine for peeling peaches.”

That statement was predicated on as complete a record, so far as facts are concerned, as has been produced at any time in any of the subsequent litigation or by the testimony of either plaintiff or defendants.

This court approved specifically the finding of the Court of Appeals for the District of Columbia, saying in 247 Federal at 792:

“We see no reason for reversing this decision, after a careful reading of the testimony.”

and in the opinion of this court in *Dunkley v. Pasadena*, 261 Federal 386, this court quoted its former opinion

with approval at page 387, and did not hold the Dunkley patent invalid or disturb its former finding.

The Court of Appeals in New York did not affirm the District Court, Judge Hand's finding of invalidity, but stated that that question was not before them, saying (277 Fed. Rep.) at page 1001:

“We need not go further and consider the validity and scope of Dunkley's patents. On this point we express no opinion, but affirm the decree below *on the sole ground of license.*”

These decisions of the Courts of Appeals control the decisions of Judge Trippett and Judge Hand, making their expression of opinion *obiter* and of no force. It is therefore clear that the Dunkley patent has not been decreed invalid anywhere, and it is strongly supported by all decisions and decrees where that question has been involved and considered.

We regret the necessity of constantly being called upon to correct the misstatements made by counsel for the defendants in these matters.

Page 5, “Procedure”: We call particular attention to the authority cited by petitioners as supporting their position, *John Simmons v. Grier Bros. Co.*, decided by the Supreme Court February 27, 1922, and reported in the Advance Sheets of the Lawyers Co-operative Publishing Company April 1, 1922, at page 268.

In that case Mr. Justice Pitney, speaking for the court, points out at the end of page 271:

“The decree of July 24, 1914, although following a ‘final hearing,’ *was not a final decree*. It granted to plaintiffs a permanent injunction upon both grounds, but an accounting was necessary to bring the suit to a conclusion upon the merits. An appeal taken to the circuit court of appeals, whose jurisdiction, under Section 129 Judicial Code, extended to the revision of interlocutory decrees granting injunction, followed by the decision of that court reversing in part and affirming in part, did not result in a decree more final than the one reviewed. * * * There was nothing to take the case out of the ordinary rule that *there can be but one final decree in a suit in equity*. * * *”

“As the decree in question was entered pursuant to the mandate of an appellate court, proper deference to its authority required that a proceeding to reopen it, whether by rehearing or review, should be first referred to that tribunal.”

The defendants in the instant cause applied to this tribunal before the mandate was sent down. The Supreme Court in the Simmons case, after citing authority, said:

“That having been done in this case, and leave for the purpose obtained (leave to grant a ‘review’ fairly included any step short of that), what obstacle stood in the way of correcting the decree? The suit was still pending; plaintiffs applied promptly after the decision of this court in the *Abercrombie & F. Co. suit*, 245 U. S. 198, 62 L. Ed. 240, 38 Sup. Ct. Rep. 104.”

The court then said, page 273, after further consideration:

“afforded ample ground for setting matters right upon a *rehearing* before final decree, as was in effect done by the district court.”

Therefore, the petition in the instant cause, as it is made before the entry of final decree, is only to be regarded as a petition for a rehearing, and it has been presented to this court in a former petition to rehear on the record, and later by motions to set aside the decrees which were denied just previous to sending down of the peremptory mandate, and thereafter by an application to Judge Van Fleet, who has in detail passed upon the merits and also pointed out that the petition was not timely. All of these matters, if the defendants have any rights, are capable or review herein on appeal in the case after final decree. No final decree has been entered. The interlocutory decree is not reviewable as we have pointed out, in the appeal herein because this appeal was premature from an interlocutory order and not from a final decree.

It appears that the merits of the whole matter have been submitted to and been passed upon by the District Judge. It is not proper to be considered here at the present time and in the present manner.

The Supreme Court, in *Simmons v. Grier*, *supra*, points out that the matter is, until the decree becomes final, merely a petition to rehear. The matters have all been submitted herein time and again on that basis. They are not proper to be reviewed here because they do not come within the provision of the statute granting appeals. The matter is already before the court below and held insufficient on interlocutory order. A final decree may sometime be entered when the matter can be considered by this court for what it is worth, both on the merits and on proper procedure. Under the new equity rules, however, the procedure is very elastic.

Page 6, “*Litigation over Dunkley Patent*”: This is also misstated. We will merely recite the decisions showing what was decided in each:

(A) Decision of the Court of Appeals of the District of Columbia, in *Dunkley v. Keekhuis*, 190 O. G. 267, 39 App. D. C. 494, holding on a full record:

“Dunkley was the first to invent and put into practice a rapid and effective machine for peeling peaches.”

(B) Decision of Judge Van Fleet herein (not reported, printed in Record No. 2915, page 696), after a five-day trial upholding the Dunkley patent, approving the decision of the Court of Appeals of the District of Columbia and construing the Dunkley patent broadly.

(C) Decision of this court, 247 Fed. 790, affirming Judge Van Fleet’s decision and specifically considering and approving the Court of Appeals of the District of Columbia.

(D) Decision of Judge Trippett in *Dunkley v. Pasadena*, 261 Fed. 203, holding (1) the Dunkley patent bad and (2) holding non-infringement.

(E) Decision of this court in *Dunkley v. Pasadena*, 261 Fed. 386, affirming the decision of Judge Trippett on the ground that “it is only necessary for us to consider the question of infringement”; quoting and approving the first decision of this court and not considering the merits of the patent as to the spray or its equivalent.

(F) Decision of Judge Hand in the New York case, *Dunkley v. California Packing Corporation*, 277 Fed. 989, which (1) followed Judge Trippett in holding the Dunkley patent bad and also (2) holding that the defendant there was a licensee.

(G) Decision of the Court of Appeals of the Second Circuit, 277 Fed. 996, which affirmed "the decree below on the sole ground of license" and "on the validity and scope of Dunkley's patents express no opinion."

(H) Decision of Judge Van Fleet herein, denying the petition for a request to this court to withdraw its mandate, 277 Fed. 1001. Judge Van Fleet pointed out the errors of Judge Trippett and Judge Hand and reaffirmed his decision herein, stating that the defendants had in no way complied with the rule of *Symington v. National Malleable*, 250 U. S. 383.

From this recitation of decisions, the misstatement of the situation by petitioners' counsel clearly appears, and we will not discuss the same further than it is incidentally touched upon in other phases of this reply. We refer particularly to the succinct statements of Judge Van Fleet's opinion at 277 Fed. 1001, and in Record No. 3824, page 279, reviewing the entire matter.

Page 9, "General Considerations Bearing upon the Underlying Equities of these Applications":

1. It is true that Judge Trippett and Judge Hand have in opinions held the Dunkley patent to be invalid, but on appeals neither of these decisions were affirmed on these grounds. This court pointed out in the Pasa-

dena case that this question was not before it and held non-infringement, and the Court of Appeals for the Second Circuit on appeal from Judge Hand distinctly stated that they would "express no opinion on the validity and scope of the Dunkley patents" but affirmed the decision "solely on the ground of license." The statements of Judge Trippett and Judge Hand are *obiter* and not decrees.

2. The new and additional evidence that is said to have been before Judge Trippett and Judge Hand has been ably and completely and authoritatively discussed by Judge Van Fleet in his opinion herein. He stated the matter so fully that we simply refer to that opinion as a most concise and authoritative statement without repeating it here. We consider the matter later more in detail.

3. There is no new and additional evidence supporting the defendants' case that is of an equivocal character, and there has been no vital *change* of testimony by the two Dunkleys. There is a considerable amount of documentary proof now appearing which fully supports Dunkley's position. The newspaper article of April 22, 1904, shows a paring table being built in the year 1904, as pointed out in Melville Dunkley's testimony. There never was any question about there being the long paring table at the plant of the Dunkley Company in 1903 and prior thereto, because a photograph of it was offered in evidence before this court and it appears in the original record herein, No. 2915, at page 911, which was before this court. This was offered by defendants in sur-rebuttal testimony, and the plaintiff accepted it

without offering one syllable of testimony to the contrary, and never questioned its existence. The location of that table is correctly indicated in Defendants' Exhibit T, page 902 of original record herein, No. 2915.

As to documentary proofs, the plaintiff has produced the framework of the original machine of 1902, which we submit is superior to any mere picture or description of it, and it has been proven by a long list of witnesses.

4. The "curious and peculiar equities here presented," considering the language of this court in applying the rule "*Falsus in uno, falsus in omnibus*," in its opinion in the main decision herein, is quite remarkable. The language of this court to which we refer is in 247 Fed. Rep., bottom of page 793, where this court was considering the testimony of Stewart Campbell, saying:

"If Campbell's testimony was not true, he was testifying falsely concerning a material and relevant matter, and his testimony would for that reason be wholly rejected. '*Falsus in uno, falsus in omnibus*.'"

It is but a reflection upon the entire testimony of Stewart Campbell by this court after considering his testimony in this case and the opinion of Judge Van Fleet upon it. Yet, notwithstanding the stricture, we find Stewart Campbell relied upon by Judge Trippett, 261 Fed. at page 208, saying:

"It is proper that the court should *notice especially* the testimony of Stewart Campbell."

Saying at page 209, end of fraction of paragraph at top of page:

“There is no reason in any event for discrediting Campbell’s story.”

Yet Judge Trippett was considering the very testimony that had been passed upon by this court, and considering the rejected testimony of this very witness whom this court had found to be a falsifier—whether deliberate or otherwise is not material.

We have the feeling that the consideration of Stewart Campbell’s testimony will show that he was mentally disturbed, for his prejudices are most astonishing and unaccountable, and as to his statement we believe Judge Van Fleet was entirely warranted in saying he “could not extend the limits of his credulity sufficiently to put credence in it.”

The proposition or rule of “*Falsus in uno, falsus in omnibus*” still certainly applies, so far as Campbell is concerned, and his is the foundation of the testimony on which the Dunkleys are attacked. All other testimony could be regarded, if it is of any weight, as merely corroboratory. It is merely oral, without documentary or other support.

5. (Page 10.) The evidence does go into detail. The language of Judge Trippett just quoted shows that he depended upon Stewart Campbell as his main support, and the language of Judge Hand is not capable of any different consideration. The language of Judge Hand to which we particularly refer is at 277 Fed., page 993, where he says:

“Judge Trippett has discussed this testimony carefully and has reached the conclusion that

Stewart's testimony that he made the first machine in 1903 is correct."

(Stewart's meaning Stewart Campbell.) This shows that Judge Hand after this court in rejecting Campbell's testimony had pointed out and applied the rule of "*Falsus in uno, falsus in omnibus*" to Stewart Campbell's testimony, gave it his brand of approval, notwithstanding the finding of this court was but an affirmation of the finding of Judge Van Fleet, who heard Stewart Campbell testify in the first instance before there had been opportunity to coach him in the details.

It is therefore most astonishing that the petitioners-defendants herein should now suggest that because of this same rejected testimony of Stewart Campbell, the testimony of plaintiff should be found false, and the rule should be applied to it. The rule still continues applicable to Stewart Campbell's testimony, which is the backbone of defendants' case.

The matter of the decisions of Judge Trippett and Judge Hand, urged in defendants' fifth paragraph is certainly discredited by the previous application of the rule of "*Falsus in uno, falsus in omnibus*" made by this court.

Page 11, "New matter analyzed": The new matter does not bear. There is in fact no new matter about it.

2. (Page 12.) The Dunkley-Norton correspondence supports Dunkley's position (discussed under a later head).

3. The Dunkley pay rolls are documents tending to support the Dunkley position (discussed later herein).

4. The newspaper article of April 22, 1904, completely supports Dunkley's position, and shows that a new paring table 110 feet long was being put in in 1904 and that two lines of machinery were being installed, a matter wholly inconsistent if there had been but a mere brief test of the machine the year before, as claimed by defendants. The facts conform to the Dunkley testimony.

5. The large amount of testimony referred to is merely oral statement, unsupported by documents, of events long past.

Page 15, "*The proofs on behalf of Dunkley are now legally insufficient to sustain the patent*": The proofs abundantly support Dunkley's position and story in this behalf. The record does not bear out defendants' contention. We do not deem it necessary to discuss the long list of authorities under this heading, as they cannot assist the court in reaching a different conclusion than the one it has already expressed in this case.

Page 40, "*The case at bar as now made out by new evidence*": We can only say that any additional proofs in this case supported by any documents support plaintiff's position.

Page 48, "*New matter set up in Paragraph IV of the petition; its materiality and effect*": We are not particularly interested in the statement of Mr. John H. Miller,

counsel, because that statement was made without his being fully familiar with the whole situation.

Page 50, "1 Clark letter incident": A reference to the original record No. 2915 shows how this letter was introduced. It came in connection with the testimony of Melville Dunkley. At Record page 461 Melville Dunkley was asked:

"Did the Clark Engine & Boiler Co. deliver to your factory in Kalamazoo about January 30, 1904, a tank, a lye tank?

A. That I could not remember."

Dunkley produced the letter, Record page 466-7, and quotes the letter saying:

"In reply to your favor of the 21st we regret that there should be any disappointment in the cost of the tank."

An invoice was produced, bottom of Record page 467, and Mr. Lyon said:

"We object on the ground that the invoice produced by the witness is incompetent, no foundation laid. It is not the original, not shown to be a true copy."

After discussion the Court said page 468:

"The letter may be admitted in connection with the witness's statement *without the invoice*."

The letter was objected to at page 463 and the witness said:

"It is a letter which I found regarding what we suppose, that we thought was an over charge on the first experimental tank which was built for us or of which the shell was built early in 1903."

The witness testified about the same at Record page 464. The form of the question was objected to and the question was then put:

“What is the date of this transaction to which you have referred, to the best of your recollection?”

A. In April, 1903.”

showing that it was the recollection of the witness as to the letter which was admitted in evidence. We submit that nothing has modified that testimony in any material way. The particular invoice does seem to be to something else and constituted the misapprehension. It was too much for such a simple tank, hence the protest.

Judge Van Fleet has considered this matter as a matter of fact in his opinion in the present case. He considered it before in the main trial. We submit that his finding as to the facts should be quite persuasive and controlling on this Court.

Page 51, “2, Books and Records not Destroyed”: Mr. Miller made a statement in this behalf which was another misapprehension which we apprehend had no influence on this Court as he cites the proof. The testimony of Mr. Dunkley referred to is in the following language, Record No. 2915, page 444:

“Q. Where are the books of the Dunkley Company?”

A. I will have to go back to explain that. As I said before in 1908 the fruit industry of South Haven and vicinity was completely destroyed, absolutely destroyed; there was not anything left but a very few apple trees and some peach trees in what was one of the most prosperous fruit

belts of the United States; that of course was a blow that could not be appreciated unless you are in it. In 1907 the panic came, and *in 1908 the Dunkley Company went into bankruptcy, and for a year its affairs were completely demoralized, so that the records of these transactions have been more or less destroyed, so that I would be unable to say regarding that.*

Q. Have you no records whatever showing the purchase of any parts for this first experimental model machine or the first commercial machine?

A. The only record we have at the present time on this first machine covers the purchase of the first simple experimental tank that was built, that was used with this in 1903; otherwise we have practically no records left. What *few records* were left were at South Haven covering the transactions of the *factory work at South Haven*, and were burned when we had a complete fire loss in 1912."

It is now urged, most absurdly, that because the Dunkley Company received back a part of the records at the termination of the bankruptcy, for some reason the fire could not have burned the records at South Haven in 1912. The affairs of the bankruptcy were closed up long before 1912 and it is not said that all records were burned at South Haven but only as to the factory records or those factory records that would have a bearing on this tank and parts:

"What few records were left were at South Haven covering the transactions of the factory work at South Haven."

not elsewhere—

"and were burned when we had a complete fire loss in 1912."

We submit that there is no unexplained failure to produce books and records; nor is there anything extraordinary about Melville Dunkley's statement. The books of a bankrupt are not very precious.

Page 53. "3. 'The long table episode': This is so absurd as to its bearing that it is difficult to discuss it patiently. We have already pointed out that a photograph of the long table was offered in the original case and appears in the original record herein No. 2915 at page 911. It was offered in evidence in sur-rebuttal testimony by defendants, without any thought of any explanation by plaintiff because they recognized that the table was there.

Reference to the picture will show at the right a line of posts. At Record page 908 is a picture showing a plan of the factory floor on which this table was located. The entire north side of the building beyond the center line of posts is shown vacant and unoccupied, and it is in that space that the testimony shows the original first machine was installed. The space was very large. The machine was offered in evidence and a photograph of which appears at Record page 905. It is identified by many witnesses, and that structure was of such size that it was present here in the Court Room at the hearing, occupying about as much space as a desk or table. There was a tank with it—maybe as large as a small farm wagon box. These structures were disposed toward one end of this long space at the north side of the room, which space was more than 200 feet long and 16 feet wide.

We, therefore, protest regarding the statement of Judge Trippett quoted and referred to herein at page 52:

“The construction of this table and the existence thereof in the peach season of 1903 is utterly inconsistent with the theory of the plaintiff’s case.”

This is a bare naked assertion, not warranted by anything that appears in the record, and shows how completely Judge Trippett was misled by the argument of counsel. There was a space for this little machine more than 200 feet long and 16 feet wide. It would not attract much notice in that large space.

Melville Dunkley is attacked because he said that a long table was put in 1904, and yet the piece de resistance of documentary proof, offered as *new* evidence by defendants, namely, the newspaper article of April 22, 1904, appearing at page 33 of the printed petition, recites:

“as they are building an additional *paring* table 110 feet long.”

which would seem to be sufficient to warrant Mr. Melville Dunkley’s recollection of such a table.

Page 59. “4. Dunkley-Norton letters”: We have touched on these letters in sequence in our main brief pages 27 to 29, and it is not necessary to repeat that discussion here. The letter of October 23, 1903, from Norton to Dunkley speaks of the successful use of the peeling machine during the preceding season, and Mr. Dunkley discusses the matter in a series of letters back

and forth, which it will not be necessary to touch on here.

Page 70. "*5. Dunkley pay rolls*": We submit that the mere introduction of the single-line peeling machine which would take care of one or two hundred bushels of peaches in a day, and the addition thereto of a three-line machine toward the end of the season, would not have occasioned any reorganization of the time workers and the piece workers. That would probably have occurred, according to Dunkley's testimony, in the year 1904, which appears according to the analysis given by defendants at page 72.

The pay rolls do show matters of importance. The name of Eleanor Wright-Moore does not appear during the year 1903, as to which time she swore so willingly, and we are very sure she was not there. She has confused the date in some way. She was a most willing witness for the defendants.

Also, another willing witness was Verna Hallock-Kern. The pay rolls indicate that she was at South Haven until about the middle of September, 1903, and the balance of the time at Kalamazoo. Yet she is defendant's star witness as to what occurred in South Haven, as to which her testimony must have been wholly hearsay.

There are no recitations in the pay rolls as to the kind of work the people were doing. We consider the same to be of importance in the manner which we have indicated.

Page 75. "6. Newspaper article of April 22, 1904": This newspaper article is a piece of evidence that for what it is worth supports Dunkley's position. We never have heard it seriously urged that newspaper article is so accurate that it might be implicitly relied upon as evidence of any particular fact that ever occurred. In fact many times we have heard doubt expressed as to the accuracy of what appears in our daily papers.

But this newspaper article is supported by the recollection of L. L. Crosthwaite. The article might very well state that new peeling machinery was being installed because the capacity of the new machine would certainly be likely to be increased. A new machine would be made. It has been explained that the first lye tank accumulated debris in the bottom and was lacking in capacity, which would account for the large lye tank with a pocket in the bottom and of capacity to handle the output.

It was entirely proper and appropriate that the newspaper article should recite the new machinery going in, and it is not inconsistent with the testimony of the Dunkleys. They have stated that further machines were made in the year 1904 and thereafter. There is nothing about these new machines that negatives the new machine of the year before. There was a new development and undoubtedly Stewart Campbell expended very considerable ingenuity under Dunkley's supervision in perfecting what is known in this case as the "prevaricator"; that is, the lye machine.

The newspaper article of April 22, 1904, entirely supports the Dunkley contention. It would be inconceiv-

able if a bushel or so of peaches were all that were passed through the machine in the Fall of 1903, that the Dunkley Company should tear out the inside of its factory and install an entirely new equipment. Mr. S. J. Dunkley referred to this in his letter to Norton, saying:

“This we are sure will work as we worked the same thing last year and there is no question about it.”

and as to the pitting machines, that it would “only cost 3 cents per dozen to halve and pit the peaches by other methods”, so that whether those machines were a success or not was of no great consequence. We refer to these matters already quoted in our main brief.

Page 76. “7. Arthur W. Norton testimony”: Norton in *ex parte* affidavit says that there was a machine in 1903 but he characterizes it as experimental. He tells very little. He has not been cross examined. We think he did not remember much about it anyhow, but what he did remember supports Dunkley’s case. It appears that he only remembered when his memory was refreshed by Mr. Francis J. Heney. Strange that after repeated interviews he should only be able to remember something at last by the stimulating effect of an interview with Mr. Francis J. Heney. Mr. Heney is very persuasive, and we doubt if Mr. Norton’s recollection was so clear as he imagined it was. No reason is assigned for Mr. Norton’s recollection being better after the greater lapse of time.

Page 78. “(c) New matter set up in Paragraph IV of petition. Diligence in its presentation”: This needs

no further discussion than we have already given it in our main brief. We have considered the materiality of what was produced, and it makes for the case of plaintiff.

There is no diligence on behalf of defendants. They have had this information for three years and more before they finally bring it to the attention of this court. So far as this proceeding is concerned they are entirely dilatory and negligent. So far as bringing the matter into the case is concerned it has already been brought into the case it having been found wanting in merit by Judge Van Fleet, and that matter is in shape to be brought to this court on appeal, if there is any merit in it, when an appeal shall in the future be taken after the final decree has been entered herein.

Page 80. "III. New matter grouped under Paragraph VII of the Petition": We have considered any new matter and there is nothing of new matter here presented that should modify the original finding of this court. The documents all support Dunkley and the oral testimony as to matters long past, unsupported by documents, should not avail the defendant in any event. There is no materiality to the matter now offered by defendants.

The defendants naively say at page 80, "Efforts though ineffective to secure relief show diligence and tend to negative *laches*," and at page 81, great claim to diligence is made, showing that they have no faith in their proposition. So far as anything appearing in this record is concerned, the three years delay is fatal under the circumstances.

But if there is any merit to the defendants' contention, they have it already submitted in the case, and the matter can be brought here, if there is eventually an appeal from a final decree—not on an appeal from an interlocutory decree, because such matter is not appealable. An application properly presented to rehear can be considered by this court. Such matters have been presented, and if they are proper to be considered this court can review them, and the remedy here sought of filing an original bill in the nature of a bill of review does not obtain because it is but asking for a rehearing, which has been repeatedly considered by this court.

Page 82. “*V. Decision of Judge Van Fleet on petitioners' applications that he request this court for permission to reopen*”: Judge Van Fleet refused to allow an appeal from his decision on that matter, because it was not applicable, and he has not misapprehended. Application had been made to this court to give leave to reopen this case. Litigation should end.

It is not necessary to discuss the rule of law applied by Judge Van Fleet. It was obviously correct. Dunkley has an existing patent; whereas, there is no proof worthy of special consideration as to Grier and no proof that he had anything prior to Dunkley.

As to the second item toward the bottom of page 83, we have already discussed Judge Trippett and Judge Hand, and they certainly based their conclusions on the testimony of Stewart Campbell, because they say they did, which, however, is quite astounding after this court had applied the rule of “*Falsus in uno, falsus in omnibus*” to Campbell's testimony in rejecting the same.

Page 84, "*Dunkley has contributed nothing to the art. Patent void for other reasons*": Responding to this we can say that the decision of the Court of Appeals for the District of Columbia is one of high rank and it is the foundation on which the Dunkley patent was issued as the result of an *inter partes* contest, an interference with Beekhuis, where this whole subject was carefully considered and argued.

That decision has been upheld ever since and the proofs have not changed since that date. As pointed out, Dunkley has no disposition or desire to change his proofs. His proofs then were that he had a complete machine installed in July, 1903. His preliminary statement shows conception of the invention the summer and fall before and the making of sketches and the like, and his testimony shows that peaches were peeled and the machine sufficiently tested then to know reasonably what the result would be, but the first machine was reduced to practice and tested out about July 15, 1903. The date of conception reaches back to the year previous.

CONCLUSION

We can only respond in conclusion that the defendants have heretofore made many moves for a rehearing. Under the latest decision of the Supreme Court on this subject, *Simmons v. Grier Brothers, supra*, they have no right now to file an original bill in the nature of a bill of review. Their remedy is by rehearing because of alleged newly discovered evidence, which must be material and diligence must appear. The court below has ruled on that as insufficient. It has further ruled that the petition was not presented in a timely manner but has chosen to consider the merits, indicating that in view of the high importance of the matter he would reopen the case if he found there was testimony to warrant it.

That matter is not reviewable on appeal from an interlocutory decree. If reviewable at all it can be reviewed by this court, as a court reviewing an equity matter after an appeal has been taken from a final decree in the case. The defendants can then be given every consideration the circumstances will warrant.

Defendants should not be allowed longer to delay this proceeding. Their motion should be denied.

Respectfully submitted,

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Appellees.